The FCC acknowledges that true coverage or signal strength will vary greatly from its estimates. See 47 C.F.R. §73.683 ("Under actual conditions, the true coverage may vary greatly from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based.") As particular households are the focus of the SHVA, PrimeTime 24 argues that a grade B intensity signal should be defined with the intent of Congress in mind - a signal that produces a picture with acceptable quality.

Although PrimeTime 24 is correct that there are limitations on how the FCC estimates a grade A and grade B signal, the code specifically states that the FCC will not consider variations when estimating a signal's strength. In particular, 47 C.F.R. § 73.684(a) states that "[a]ll predictions of coverage . . . shall be made without regard to interference and shall be made only on the estimated field strength." Thus, although the FCC's method of estimating a grade B signal is imperfect, such imperfections are disregarded. See 47 C.F.R. § 73.683(b), supra, at n.8.

In stating that the FCC shall define a signal of grade B intensity, Congress endorsed the FCC's method of determining such signals. That this was Congress' intent is supported by a House Judiciary Committee Report prepared a few weeks after it drafted

the definition of "unserved household," which stated that a signal of grade B intensity was as defined by the FCC, currently in 47 C.F.R. § 73.683(a). H.R. Rep. No 100-887, pt. 1, at 26 (1988) (emphasis added).

PrimeTime 24 arguments in favor of a subjective test are essentially that signal intensity is not the proper standard by which to achieve Congress' objective in the SHVA. Whether Congress' has chosen the best standard, however, is not for the Court to decide. The duty of the Court is to construe statutes as Congress reasonably intended in accordance with its language. See Caminetti, 242 U.S. at 485; Scrimgeour, 636 F.2d at 1022.

Congress clearly defined a grade B signal based upon the FCC's objective standard and not on whether a household received acceptable picture quality. PrimeTime 24's emphasis on the latter runs contrary to the SHVA. Accordingly, the Court agrees with the Magistrate Judge's finding that the SHVA defines "unserved household" under the FCC's objective standard, and not on a particularized finding that "a" or "certain" households receive acceptable picture quality.

2. Evidence Establishing Likelihood of Success

Next, PrimeTime 24 argues that even if signal strength is the ultimate determinant of eligibility under the SHVA, Plaintiffs' evidence does not support injunctive relief. In particular, PrimeTime 24 attacks Plaintiffs Longley-Rice maps,[3] and the results of Plaintiffs' signal strength tests in the Miami area. PrimeTime 24 contends that this evidence was either inadmissable or unreliable. Furthermore, PrimeTime 24 maintains that its evidence, questionnaires from subscribers stating that they do not receive an acceptable picture over the air, sufficiently shows that its subscribers do not receive a grade B signal.

Under the SHVA, a satellite carrier such as PrimeTime 24, has the burden at trial of proving that its transmission of network programming goes only to "unserved households." 17 U.S.C. § 119(a)(5)(D). Although a party seeking a preliminary injunction bears the burden of showing likelihood of success on the merits,

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[3] As Magistrate Judge Johnson described in her Report, the Longley-Rice maps were created using the "Longley-Rice" propagation methodology. "This methodology was developed by U.S. government scientists, and now exists in the form of a computer program that can be obtained from an agency of the U.S. Department of Commerce. The methodology takes into account detailed data about the terrain that surrounds a particular television broadcast tower" and can be used to measure the intensity of a signal from a particular television station. See R&R at 17.

the court must consider that the ultimate burden of proof at trial is upon the nonmovant. See Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 336-38 (5th Cir. 1981)(in assessing likelihood of success on the merits, court took into account nonmovants ultimate burden of proof.) Thus, as noted in the Report, Plaintiffs can establish likelihood of success on the merits by demonstrating that PrimeTime 24 is unlikely to prove at trial that its subscribers are "unserved households." See R&R at 30.

a. PrimeTime 24's Evidence of Compliance with the SHVA

PrimeTime 24 has asserted that its efforts to comply with the SHVA demonstrate that Plaintiffs cannot succeed on the merits. PrimeTime 24 requires customer service representatives to ask all potential subscribers about their picture quality, and only sells its product to persons who state that they receive unacceptable pictures with a conventional rooftop antennae. See Obj. at 41. Furthermore, PrimeTime 24 states that it sends questionnaires to all of its subscribers who are challenged by the network stations, and only provides service to those subscribers who state that they receive unacceptable pictures. See Obj. at 41.[10] From this

[10] 17 U.S.C. § 119 requires PrimeTime 24 to provide each network a monthly list of all new subscribers receiving that

evidence, PrimeTime 24 argues that the Court should infer that its subscribers are among the people who do not receive a grade B signal.

The Magistrate Judge correctly rejected this argument. As the Report noted, "[t]here are a variety of reasons, unrelated to being an 'unserved household' why a customer might sign up for PrimeTime 24." R&R at 10. For instance, "viewers with access to additional network stations can watch network programs several hours later (or earlier) by watching a station from a distant time zone and can see sports programs (such as NFL football) that are not available locally." Id. In addition, subscribers to PrimeTime 24 receive many more television channels than with over-the-air antennas, without the need to install or maintain the antenna.

Furthermore, PrimeTime 24 again focuses on picture quality rather than on the FCC's objective test to determine whether a household is "unserved." As previously discussed, Congress established an objective test to determine which households a satellite carrier could rebroadcast network television without a license. The test is whether the household can receive a grade B

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network's programming. The network stations or their affiliates can then use those lists to "challenge" subscribers who they believe are not "unserved."

signal as defined by the FCC. Asking potential subscribers about picture quality, simply fails to provide evidence that such subscribers fit within Congress' definition.

Although PrimeTime 24 contends that a subscriber' perception of picture quality is an indicator of whether a household receives a grade B signal, Plaintiffs' evidence shows otherwise. As the Report states, "the only reliable data before the Court shows a strong relationship between signal strength and picture quality." See R&R at 20. Accordingly, the Court agrees with the Magistrate Judge's determination that PrimeTime 24 has failed to produce evidence that its subscribers meet the statutory standard for "unserved households."

b. Plaintiffs' Evidence of PrimeTime 24's Noncompliance with the SHVA

As a further reason why Plaintiffs cannot demonstrate a likelihood of success, PrimeTime 24 contends that Plaintiffs' Longley-Rice maps[11] were inadmissible evidence because the maps were hearsay under Fed. R. Evid. 802, and the expert testimony regarding the maps was inadmissible under Fed. R. Evid. 703. In addition, PrimeTime 24 disputes that Plaintiffs' signal strength tests at 100 locations in the Miami area were relevant because the testing

[11] Defined, supra at n.9.

methodology was flawed, and South Florida's topography is not representative of the Nation.

i. The Longley-Rice Maps

PrimeTime 24's argument that the Longley-Rice maps were inadmissible hearsay is meritless because "[a]ffidavits and other hearsay materials are often received in preliminary injunction hearings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding." Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986); See Levi Strauss, 51 F.3d at 985; McLaughlin v. Williams, 801 F. Supp. 633, n.10 (S.D. Fla. 1992) (Marcus, J.). Thus, even if the maps were hearsay, admission of the evidence was proper "giving due weight to the fact that [PrimeTime 24] did not have the opportunity to confront the declarant, and the need for expedition . . . ." McLaughlin, 801 F. Supp. at n.10.

In any event, the maps were not inadmissible hearsay. When expert testimony is offered, it is admissible if it is reliable and relevant. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591-93 (1993). Rule 703 of the Federal Rules of Evidence provides that experts may rely upon facts or data that are not

admitted into evidence at the hearing if such evidence is of a type reasonably relied upon by experts in the particular field.

In the instant matter, Plaintiffs' Longley-Rice maps were created by using two forms of technology: 1) the Longley-Rice propagation methodology which determined the signal strength of certain network affiliates and drew them onto a map of the area, and 2) Geocoding which pinpointed PrimeTime 24's subscribers onto the Longley-Rice maps. These maps thus demonstrated which of PrimeTime 24's subscribers could receive a grade A or B signal for a network affiliate in a given area.

The Magistrate Judge found that the Longley-Rice maps were relevant and reliable evidence. As the report stated,

> "the "Longley-Rice" propagation methodology . . . was developed by U.S. government scientists, and . . . now exists in the form of a computer program that can be obtained from an agency of the U.S. Department of Commerce. The Longley-Rice methodology takes into account detailed data about the terrain that surrounds a particular television broadcast tower. Longley-Rice maps thus provide the best available information, short of conducting actual field measurements, about the likelihood that a specific household can receive a signal of a particular intensity from a particular television station."

R&R at 17 (citations omitted).

As to geocoding, the Magistrate Judge found that the process

> "uses subscriber addresses, in combination with a database of information from the U.S. Census and the U.S.

> Post Office, to provide detailed longitude and latitude information for specific subscribers. These subscribers are represented by the black dots on the map. The maps also contain reliable counts of the numbers of subscribers in the Longley-Rice Grade A and Grade B areas and in other defined areas."

R&R at 18.

The expert who testified as to the Longley-Rice maps, Mr. Jules Cohen ("Cohen") stated that he arranged for and supervised the creation of the Longley-Rice maps that were introduced as evidence, and that he had personal knowledge of how such maps were created. See Tr. 6/3/97, D.E. #114, at 260 & 264. Cohen also testified that such maps were reasonably relied upon by experts in his field. Id. This information is sufficient for the Court to find that the maps were admissible as relevant and reliable evidence for the purposes of the Preliminary Injunction.

Next, PrimeTime 24 asserts that Cohen's testimony regarding the maps did not constitute admissible expert opinion because he did not rely upon personal knowledge, but instead only presented results of work performed for Plaintiffs by two other sets of people. Experts may generally rely upon facts or data that is reasonably relied upon by experts in the field. Fed. R. Evid. 703. Rule 703 was intended to "negat[e] the need to parade into court each and every individual either remotely or intimately involved

. ." in an expert's testimony. U.S. v. Abbas, 74 F.3d 506, 513 (4th Cir.), cert. denied, 116 S. Ct. 1868 (1996).

Cohen testified that the companies he used to create the maps were reasonably relied upon by experts in his field of broadcast engineering. Cohen also testified that he reviewed the maps and made corrections based upon his 50 years of expertise in broadcast engineering and his personal knowledge of the television markets around the world. Id. at 264. This testimony is sufficient to warrant its consideration by the Magistrate Judge.[12]

ii. Plaintiffs' Signal Strength Tests

In addition to Mr. Cohen's testimony, Plaintiffs presented evidence of signal strength tests taken at 100 locations in the Miami area. PrimeTime 24 contends that the signal strength tests were not probative evidence because the methodology used was inappropriate. Congress did not indicate the methodology that should be followed when measuring signal intensity; but rather

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[12] PrimeTime 24 also raises various other problems with Plaintiffs' reliance in the Longley-Rice model and maps including that: 1) the map incorrectly assumes that a conventional outdoor rooftop antenna is 30 feet in the air, 2) the maps ignore seasonal variations 3) the maps establish abstract probabilities, and 4) Plaintiffs failed to introduce evidence as to the accuracy of the maps' calculations. Even if PrimeTime 24 is correct that Longley-Rice maps make these errors in assumptions, this evidence goes only to the weight of the evidence, not to its admissibility.

intended that satellite carriers and broadcasters would agree to such standards. See Obj. at 36-37. PrimeTime 24 states that although there were negotiations, no agreement was reached. Id.

Plaintiffs used the measurement procedures set forth by the FCC in 47 C.F.R. §73.686 for their signal strength tests. PrimeTime 24 argues that if Congress had meant for signal intensity testing to be measured by the procedures set forth in 47 C.F.R. § 73.686, it would not have left the formulation of the testing methodology to industry negotiations. PrimeTime 24 also argues that the methodology Plaintiffs used for the signal tests were designed to produce the highest signal strength readings under ideal conditions.

PrimeTime 24's position that the signal strength tests were not probative is unavailing. PrimeTime 24's own expert used the testing procedures provided for in 47 C.F.R. §73.686. Furthermore, since the SHVA states that the FCC should define a signal of grade B intensity, absent an industry agreement, the FCC's standard for measuring signal intensity is the most appropriate standard to utilize.

Plaintiffs signal strength test results were significant in that all of the 100 randomly tested subscribers received a signal of at least grade B intensity from both the CBS and Fox local

affiliates. In fact, almost all 100 subscribers received a signal of Grade A intensity from both stations. See R&R at 18. These results are relevant even if the Miami's local terrain is flat. As the Magistrate Judge found, the Longley-Rice maps do consider the terrain in each location. The signal tests serve to underscore Plaintiffs' contention that PrimeTime 24 subscribers are not "unserved households," and as such the results are relevant. After considering all of Plaintiffs evidence and the record, the Court finds that there is sufficient evidence to support a finding that PrimeTime 24's services are not restricted to "unserved households."

c. **Willful or Repeated**

Under the statute, however, a satellite carrier's delivery of network stations to unqualified households violates the SHVA only if it is either "willful" or "repeated." 17 U.S.C. § 119(a)(5)(A) (emphasis added). PrimeTime 24 maintains that the Magistrate Judge erred in finding that its violations of the SHVA were willful or repeated.

The Magistrate Judge found that "to prove willfulness it is necessary only to show that a person knew it was doing the acts in question, not that the person knew those acts were wrong." R&R at 49 (citing 47 U.S.C. § 312(f)(1) ("the term 'willful' . . . means

the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any . . . rule.") Furthermore, the Report noted that PrimeTime 24 has itself benefitted from this definition of the term willfulness when it obtained an award of damages for a defendant's unauthorized "willful" misappropriation of PrimeTime 24 transmissions. PrimeTime 24 Joint Venture v. Telecable Nacional, 1990 WL 598572 (D.N.J. 1990); R&R at n.18.

PrimeTime 24 maintains that the Magistrate's standard to determine wilfulness failed to consider Congress' recognition that possibilities of error would occur, and that damages should only be imposed if satellite carriers did not attempt to comply with the Act in good faith. PrimeTime 24 refers the Court to 17 U.S.C. § 119(a)(5)(A) which provides that a satellite carrier may avoid damages by "t[aking] corrective action [such as] promptly withdrawing service from the ineligible subscriber." However, as the Report noted, Section 119(a)(5)(A) refers only to damages, not with a request for injunctive relief as is before the Court.

Nevertheless, even if the "willful" standard required a finding of aggravated negligence, the Magistrate Judge also correctly determined that the evidence warranted such a finding. See R&R at 32. Plaintiffs' evidence indicates that PrimeTime 24 is

broadcasting copyrighted network programming to hundreds of thousands of subscribers who receive a signal of grade B intensity as defined by Congress.

PrimeTime 24 has simply ignored the grade B test even though it "tried and failed to persuade Congress to adopt a test of eligibility based on subscriber statements about over-the-air reception." R&R at 32. The Magistrate Judge found that PrimeTime 24 was aware of the governing legal standard. In a mailing to subscribers regarding the SHVA, PrimeTime 24 stated that the Act imposes "a technical standard used by the [FCC] as an indicator of adequate service. Unfortunately, this technical standard often does not reflect the quality of the picture that you are actually getting on your television set." R&R at 12 (citing Def. Ex. 40). In addition, in efforts to persuade subscribers to write their legislative representative, PrimeTime 24 stated that "[u]nder the current law, your ability to view satellite network TV is based upon the intensity of the signal you receive from your local station, not based upon the quality of the picture on your TV set . . . ."

This evidence demonstrates that PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it. Accordingly, the Magistrate Judge correctly rejected PrimeTime 24's

protests of "good faith."[13] In sum, Plaintiffs evidence establishes a likelihood of success proving that PrimeTime 24 wilfully and repeatedly rebroadcast copyrighted network programming to served households in violation of the SHVA.[14]

B. Irreparable Harm in Copyright Cases

The Magistrate Judge found that in copyright cases, once a plaintiff has established a likelihood of success, there is a presumption of irreparable harm. The majority of Circuits that have considered this issue have held that once a plaintiff establishes a prima facie case of copyright infringement, irreparable injury is presumed. See R&R at 36-39. Courts have applied this presumption in copyright cases because of "the unique nature of intellectual property and the difficulty of calculating

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[13] The Court also rejects PrimeTime 24's unclean hands defense for the reasons stated in the Report at pages 33-36.

[14] PrimeTime 24 also argues that it was not economically practical to test the signal strength at each subscriber's home, and that Congress contemplated no such thing. However, as discussed previously, Congress defined the term "unserved household" based upon an objective test of signal strength. Although it may not be economical to test each potential subscriber, PrimeTime 24 cannot create its own definition of the term "unserved household" and supply its services to anyone who fits within that definition. In addition, whether it is economically practical to comply with the statute is not relevant.

damages after the fact." R&R at 37-38 (citing Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288-89 & n.10 (10th Cir. 1996)).

Although the Eleventh Circuit has not ruled on this issue, PrimeTime 24 states that the Fifth Circuit rejected this presumption prior to the split between the Fifth and Eleventh Circuits which occurred in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981). In support, PrimeTime 24 cites to Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., Inc., 807 F.2d 1256, 1261 (5th Cir.), cert. denied, 484 U.S. 821 (1987) where the Fifth Circuit held that a plaintiff must make some independent showing of irreparable injury in a copyright case to obtain a preliminary injunction. PrimeTime 24 maintains that Plains Cotton is binding on this Court because it cited Southern Monorail Co. v. Robbins & Myers, 666 F.2d 185 (5th Cir. Unit B 1982) which in turn referred to cases from district courts within the Eleventh Circuit.

However, in Southern Monorail, the Fifth Circuit stated that it "express[ed] no view[] upon whether a presumption of irreparable injury . . . is appropriate once a party demonstrates a substantial likelihood of success on the merits of an infringement claim." Southern Monorail, 666 F.2d at 187-88. In fact, the Eleventh Circuit has held that "[i]n Southern Monorail the Fifth Circuit

declined to rule on the issue [of the presumption of irreparable injury], since it disposed of the case on the balance of harm question." E. Remy Martin & Co. v. Shaw-Ross Int'l Imports, Inc., 756 F.2d 1525, 1530 n.14 & 1533-34 (11th Cir. 1985). Thus, the Fifth Circuit's holding rejecting a presumption of irreparable harm once likelihood of success is established, is not binding on this Court. After a review of the Report, the Court agrees that the Magistrate Judge reached the appropriate conclusion that irreparable harm is presumed.

In any event, the Magistrate Judge considered Plaintiffs evidence and determined that they sufficiently demonstrated irreparable harm. See R&R at 39-46. PrimeTime 24 contends that it sufficiently rebutted the presumption of irreparable harm. In support, PrimeTime 24 states that 1) plaintiffs did not provide sufficient evidence of advertising losses, 2) any risk of loss to good will is highly speculative and created by Plaintiffs, and 3) any alleged inability of PrimeTime 24 to pay a potential damages award cannot be the basis for a preliminary injunction.

The Magistrate Judge considered these arguments as to irreparable injury and correctly determined that the harm caused by

the loss of network and station advertising revenue and goodwill could be irreparable. The Court concurs with this finding.[15]

C. Balance of Harms

The Report concluded that the balance of harms favor granting Plaintiffs an injunction for two reasons: 1) PrimeTime 24's contention that the injunction would place it out of business was conjectural, and 2) an injunction would not affect PrimeTime 24's revenue stream from its largest distributor - DirecTV. See R&R at 51-2. Furthermore, the Magistrate Judge concluded that a company cannot build a business on infringements and then argue that enforcing the law will cripple that business. See R&R at 52. In its objections, PrimeTime 24 simply argues that as Plaintiffs are not irreparably injured, the balance of harms do not favor injunctive relief. However, contrary to PrimeTime 24's assertions, Plaintiffs have demonstrated irreparable injury. Thus, the Court

[15] PrimeTime 24 maintains that the Magistrate Judge incorrectly relied upon testimony from Plaintiffs' expert Preston Witherspoon Farr, who in turn relied upon a document that the Magistrate Judge excluded from evidence. The document presented data on the number of PrimeTime 24 subscribers in various markets. PrimeTime 24, contends that any reliance on Mr. Farr's testimony was clear error. However, after considering the transcript and the Report, it is evident that the Magistrate Judge's reliance upon Mr. Farr's testimony did not depend on the specific numbers contained in the stricken exhibit.

agrees that the balance of harms favor granting an injunction. See R&R 39-45.

D. Public Interest

PrimeTime 24 also disputes whether the Report adequately considered the public interest. In brief, PrimeTime 24 argues that an injunction would negatively affect the legislative intent behind the SHVA, to provide network programming to unserved households. The Report concluded that Congress had already balanced the public interest against the need to protect the network-affiliate relationship, and in so doing, established an objective test to determine which households were "unserved." The Court agrees that "[i]t is not for this Court to alter the balance that Congress has struck in seeking to advance the public interest." R&R at 55. Therefore, despite PrimeTime 24's arguments to the contrary, it is evident that the public interest favors entry of the injunction.

E. Manageability of the Injunction

In its final attempt to avoid an injunction, PrimeTime 24 contends that Plaintiffs' proposed injunction would be unmanageable. Plaintiffs have sought an injunction that would prevent PrimeTime 24 from retransmitting CBS or Fox network

programming to any customer within an area shown on a Longley-Rice propagation map as receiving a signal of at least grade B intensity without either 1) obtaining the written consent of a CBS or Fox primary network station and the relevant network, or 2) providing the station with a signal strength test of the subscriber's household showing that it cannot receive a signal of grade B intensity as established by the FCC.

PrimeTime 24 argues that such an injunction is unmanageable for several reasons. First, PrimeTime 24 argues that 99 percent of consumers who receive PrimeTime 24's signals are not PrimeTime 24's subscriber, but are instead subscribers of PrimeTime 24's distributors. Thus, enjoining PrimeTime 24 from distributing CBS and Fox signals to its subscribers is ineffective unless PrimeTime 24's distributors are involved. PrimeTime 24 maintains that since its distributors are not named in the complaint and are not PrimeTime 24's agents, the preliminary injunction would be difficult if not impossible to enforce.

Under Federal Rule of Civil Procedure 65(d), an injunction binds not only parties to the action, but also "officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." PrimeTime 24's

distributors work in close concert with PrimeTime 24 in distributing its signals to consumers. As such, if the injunction did not apply to PrimeTime 24's distributors, the injunction would be effectively nullified. Accordingly, the Court finds that PrimeTime 24's distributors are "agents" of, or "persons in active concert or participation" with PrimeTime 24. In addition, the Court's preliminary injunction order shall set forth in reasonable detail, the act or acts to be restrained, and the persons to be restrained. See Fed. R. Civ. P. 65(d). Thus, any injunction against PrimeTime 24 would be applicable to its distributors.

Secondly, Prime Time 24 argues that the nationwide nature of the injunction presents implementation and enforcement issues because of: 1) the topographical and other variations in the various local television markets across the country, 2) the Court lacks the institutional expertise and resources to supervise the injunction, 3) Plaintiffs have not provided Longley-Rice maps for approximately 80 percent of the local television markets in the United States, and 4) there is no consensus as to how signal intensity tests should be conducted.[16] Although these issues will

[16] As discussed, supra at 26-28, any signal strength tests should be conducted in conformance with the FCC's measurement procedures outlined in 47 C.F.R. §73.686.

make the enforcement of the preliminary injunction challenging, the Court will issue such orders as is necessary to enforce the injunction.

For these reasons, the Court rejects PrimeTime 24's position that the proposed injunction will be unmanageable.

F. Bond

Magistrate Judge Johnson found that the preliminary injunction should issue without the posting of a bond. Although a court has the discretion to forego a bond, where an injunction may have severe consequences to a business, requiring the posting of a bond is prudent. Plaintiffs have as much as admitted that a bond would be appropriate. See Resp. at 45-46. Therefore, the Report is **REVERSED** on this issue, and the parties shall file papers within ten (10) days of this order addressing the amount of a reasonable bond. These papers shall not exceed twenty (20) pages in length.

G. Magistrate Judge Johnson's Report and Recommendation

On a final note, PrimeTime 24 has suggested that this Court disregard Magistrate Judge Johnson's Report because she adopted material from Plaintiffs' proposed Report almost verbatim. PrimeTime 24 contends that it is disfavored for courts to adopt

findings of fact and conclusions of law that are prepared by counsel of one of the parties. See Obj., D.E. #156, at 16-19.[17]

However, the fact that a judge allowed a litigant to draft the court's orders does not automatically invalidate those orders unless a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. See In Re Colony Square Co. v. Prudential Ins. Co. of America, 819 F.2d 272, 276 (11th Cir. 1987), cert. denied, 485 U.S. 977 (1988). Courts have counseled judged against signing orders that have been written by counsel of one of the parties because "of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor." Anderson v. City of Bessemer, 470 U.S. 562, 572 ((1985).

In the instant matter, the Magistrate Judge requested that both parties submit proposed findings of fact and conclusions of law before advising them of her decision. The parties' opposing submissions tempered any potential "overreaching."

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[17] As support PrimeTime 24 cites In re Colony Square, 819 F.2d 272, 274 (11th Cir. 1987), cert. denied, 485 U.S. 977 (1988); United States v. El Paso Natural Gas Co., 276 U.S. 651, 656 (1964) among other cases.

In addition, as Plaintiffs note in their Response, one of the cases PrimeTime 24 relies upon to support its position specifically suggests the practice Magistrate Judge Johnson used. In J. D. Bradley v. Maryland Cas. Co., 382 F.2d 415, 423-24 (8th Cir. 1967), the Court stated that

> "if, because of prevailing custom, or pressure of work, or a case's technical nature . . . counsel must be asked to assist in the preparation of findings and conclusions, it is better practice to make this request at or soon after the submission of the case and prior to decision and to make it of both sides. 5 Moore's Federal Practice (2d ed. 1966) at 2665. Then the court may pick and choose and temper and select those portions which better fit its own concept of the case."

PrimeTime 24 admits that the Report did not adopt Plaintiffs' proposal without incorporating alterations that included several of PrimeTime 24's proposed findings of fact. Furthermore, the Magistrate Judge added some of her own material and omitted several paragraphs and footnotes contained in Plaintiffs' proposal. The Court is therefore satisfied that the Magistrate Judge arrived at her decision in through a fundamentally fair process. And after a thorough review of the Report, the Court largely concurs with the Report's recommendations.[18]

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[18] PrimeTime 24 also points out a few errors in the Report that supposedly illustrates her lack of conscientiousness. After considering PrimeTime 24's position, the Court finds that these errors were trivial and that they in no way undermine the validity

CONCLUSION

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Magistrate Judge Johnson's Report and Recommendation is **AFFIRMED in part** and **REVERSED** in part. The Magistrate's Finding of Facts and Conclusions of law are **ADOPTED** and Plaintiffs' Motion for Preliminary Injunction (D.E. #45) is **GRANTED**. However, the Magistrate's determination that a bond is unnecessary is **REVERSED**. Therefore, the parties shall file a memorandum within ten (10) days of this order addressing the issue of a reasonable bond. These papers shall not exceed twenty (20) pages in length.

2. Plaintiffs' Motion for Immediate Ruling (D.E. #182) is **DENIED as moot**.

3. PrimeTime 24's Motion to Strike Portions of Plaintiffs' Motion for Immediate Ruling (D.E. #183) is **DENIED as moot**.

DONE and **ORDERED** in Chambers, Miami, Florida, this 12 day of May, 1998.

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

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of her decision.